Much Ado About the First Amendment - Does the Digital Millennium Copyright Act Impede the Right to Scientific Expression?: Felten v. Recording Industry Association of America

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MUCH ADO ABOUT THE FIRST AMENDMENT--
DOES THE DIGITAL MILLENNIUM
COPYRIGHT ACT IMPEDE THE RIGHT TO
SCIENTIFIC EXPRESSION?: FELTEN V.
RECORDING INDUSTRY ASSOCIATION OF
AMERICA

The Digital Millennium Copyright Act was recently challenged by a scientific research team on the grounds that it restricts free speech rights. This comment surveys the litigation between the scientific research team and the Recording Industry Association of America, free speech rights in comparison to copyright protections, and proposes a solution that suggests an alliance between the two communities.

I. INTRODUCTION

Digital piracy has been a pervasive plague upon the entertainment industry, advanced by the advent of the Internet and file compression techniques available to the most basic computer user. The recording industry’s legal battle to quell the unprecedented wave of digital piracy is constant, but many users freely share copyrighted material through peer-to-peer music services. In 1998, Congress’ efforts to curb digital piracy resulted in the enactment of the Digital Millennium Copyright Act\(^1\) (“DMCA”), which prohibits illegal digital copying and trafficking.

The DMCA specifically prohibits the circumventing of technological measures designed to control access to protected works, trafficking in such technology and services, and researching for the purposes of advancing infringement.\(^2\) The DMCA, however, has been recently challenged on the basis that it violates the First Amendment of the Constitution, effectively “chilling” the scientific community from publishing its research. This comment will briefly examine the background of Felten v. RIAA, before analyzing the claim that the DMCA restrains free

\(^1\) 17 U.S.C § 1201.
\(^2\) Id.
speech. Specifically, it will examine relevant First Amendment rights and legal standards in comparison to the legal interests of the entertainment industry and its copyright holders. The comment will then conclude by proposing how the DMCA can be harmonized with free speech concerns in order to promote the advancement of scientific research and the protection of the rights of digital copyright holders.

II. FELTEN v. RIAA: CONTROVERSY BREWS OVER THE DMCA

On September 6, 2000, the Secure Digital Music Initiative Foundation, ("SDMI"), issued the SDMI Public Challenge ("Challenge"), inviting the public to attack digital watermarks and other technologies that protect copyrighted digital materials, so that the SDMI could determine which technology it should adopt. Successful challengers could elect to receive $10,000 in compensation per attack while assigning their intellectual property rights to the SDMI, or retain such rights to their property, with encouragement to submit details of successful challenges to the SDMI. The Challenge Agreement specifically authorized challengers only to attack the encoded digital music samples and files, retained the rights of the SDMI and the copyright owners under the DMCA, and prohibited reproduction, modification, distribution, performance, or making use of any of the samples.

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3 The SDMI is a multi-industry, non-profit organization, comprised of more than 180 companies and organizations in the recording industries, consumer electronics, information technology, securities technology, and Internet service providers. See RIAA Memorandum In Support of Its Motion To Dismiss.

4 The SDMI Public Challenge stated that the SDMI was in the process of testing technologies that prevent the "unauthorized copying, sharing, and use of digital music," and that these technologies "must pass several stringent tests: they must be inaudible, robust, and run efficiently on various platforms, including PCs." The Challenge invited the public to defeat the screening technology-a watermark-by removing or altering it and not significantly degrading the quality of a digital music sample, which was available to be downloaded as part of the Challenge. See EFF Complaint, Felten v. RIAA (D.N.J. June 6, 2001).

5 Id.

6 See EFF Complaint, Felten v. RIAA (D.N.J. June 6, 2001), paragraph 33.
Professor Edward Felten, Associate Professor of Computer Science at Princeton University, and his research team, entered the Challenge and successfully launched attacks on five of the six technologies offered by the SDMI. Felten and his team chose not to assign their intellectual property rights to the SDMI, and wrote a paper describing the research and successful attacks, with the intention of submitting it to a peer-reviewed scientific conference for eventual publication. The paper was accepted for presentation, and a series of communications began between Felten and Verance, a proponent of one of the technologies used in the Public Challenge, about the detailed information provided in the paper.

Felten then alleged that he received a letter from the Recording Industry Association of America ("RIAA") stating that Verance’s watermark was already in commercial use and the paper could "seriously jeopardize the technology and its contents." The letter then went on to state that if the research were to be released, the team could be subject to federal law, including the DMCA. The paper was later accepted at the 10th UNISEX Security

7 Id. at paragraph 37.
8 The paper, entitled, “Reading Between the Lines: Lessons from the SDMI Challenge” was submitted to the Fourth International Information Hiding Workshop, in late November/early December 2000.
9 According to Felten’s complaint, Felten received an email from Verance, and cordial communications began about the paper. Felten submitted a pre-publication copy of the paper to Verance with the express request that it not be circulated outside of Verance. Felten was informed that the paper had not been circulated outside of Verance, but that the SDMI, amongst others, had been notified, and that Verance was concerned about the “unnecessarily detailed information.” The communication also stated that it was not clear that such inclusions “advances your stated goals of furthering the academic body of knowledge regarding security technologies or any other cause, other than facilitating the use of your results by others seeking to circumvent the legitimate use of these technologies for copyright protection purposes.” Felten was encouraged to reconsider publication and to discuss opportunities in which individual objectives could be achieved without compromising academic value. EFF Complaint, at paragraph 41.
10 The RIAA is a trade association comprised of a membership that creates, manufactures, and distributes approximately 90% of all legitimate sound recordings produced and sold in the United States.
Felten elected to pursue litigation against the RIAA and others, claiming that the DMCA "impermissibly restricts freedom of speech and of the press, academic freedom and other rights secured by the First Amendment to the United States Constitution," by imposing civil and criminal liability for publishing speech about access technologies and copy control measures. Felten further claimed that "[w]ithout full and open access to research in areas potentially covered by the DMCA, scientists and programmers working in those areas cannot exchange ideas and fully develop their own research. As a consequence, the DMCA will harm science."

The RIAA moved to dismiss the complaint on the basis that Felten and the other plaintiffs did not have standing to pursue the claim. The court agreed, and dismissed the case. The Electronic Frontier Foundation ("EFF"), the legal team representing Felten and the plaintiffs, has stated its intention to appeal the case to the Third Circuit Court of Appeals, claiming that "[t]his decision is clearly contrary to settled First Amendment law . . . ."

According the complaint, Verance proposed over 25 changes to the paper, and Felten was informed that the paper could not be presented at the conference without written agreement by all parties concerned, before ultimately concluding that the paper could be presented. Felten claims that the paper was withdrawn because of fear of having to defend a lawsuit. The paper was later accepted at the UNISEX Symposium.

Felten, represented by the Electronic Frontier Foundation, named the SDMI, Verance, and Attorney General John Ashcroft, in his official capacity.

See EFF Complaint, at paragraph 69.

Id. at paragraph 68.

The RIAA claimed that there was no adversity of interests with respect to the papers because they expressly consented to the publication of the Felten papers, and thus a decision by the Court would have no effect on the plaintiff’s rights. The RIAA also asserted that the plaintiffs did not have standing because there was no remote threat of a lawsuit and the court should not invalidate an act of Congress in response to hypothetical, future concerns.


III. THE CONSTITUTIONAL CHALLENGE TO THE DMCA

Though dismissed on other grounds, the Felten litigation has raised important concerns over whether the DMCA is overbroad in scope. Specifically, Felten claims that it is unclear what research is proscribed under the statute, and that the DMCA targets the speech of scientists and researchers, effectively “chilling” science. The DMCA specifically references encryption research, stating that a person will not violate the Act if the research is attempted in the course of good faith research and, if the person (1) lawfully obtained the encrypted copy, phonorecord, performance, or display of the published work; (2) the act is necessary to conduct encryption research; and (3) the person made a good faith attempt to obtain authorization before the circumvention. Exemption under the DMCA is determined by examining whether the researcher disseminated the encryption research in a manner that advances the state of knowledge or in such a way that facilitates infringement. Thus, while the DMCA attempts to allow good faith encryption research while not permitting it to be circumvented for infringement purposes, this is a violation of the

18 This comment will not examine the standing issues raised by the parties, and will only focus on the validity of the First Amendment challenge to the DMCA.
19 17 U.S.C. § 1201. “Encryption Research” is defined as “activities necessary to identify and analyze flaws and vulnerabilities of encryption technologies applied to copyrighted works, if these activities are conducted to advance the state of knowledge in the field of encryption technology or to assist in the development of encryption products.” “Encryption technology” means “the scrambling and de-scrambling of information using mathematical formulas or algorithms.” Id.
20 Id.
21 Other factors for consideration include “whether the person is engaged in a legitimate course of study, is employed, or is appropriately trained or experienced, in the field of encryption technology; and whether the person provides the copyright owner of the work to which the technological measure is applied with notice of the findings and documentation of the research. A person will also not violate the DMCA if the person develops and employs technological means to circumvent a technological measure for the purpose of good faith encryption research and that person provides the technological measures to another person with whom he or she is working collaboratively...” 17 U.S.C. § 1201(g)(3)(A)-(C).
First Amendment, according to Felten’s research team.

The First Amendment states that “Congress shall make no law...abridging the freedom of speech,” and it has been described as one of the four essential human freedoms. Potential censorship by the government is rigidly scrutinized, and the Supreme Court of the United States is adamant in safeguarding the right to be free from impermissible government regulation in speech.

A. Examination of First Amendment Standards in light of Reno v. ACLU

In 1997, the Supreme Court tackled the issue of free speech regulation, the Internet and First Amendment concerns. In Reno v. ACLU, the Communications Decency Act of 1996 (“CDA”), which was enacted to protect minors from harmful material on the Internet, was challenged. The Court’s concern over the Act was based on two grounds: (1) The CDA was content-based regulation of free speech, thus having a “chilling effect;” and (2) the CDA was a criminal statute.

The Court held that the CDA’s “indecent transmission” and “patently offensive” provisions abridged the “freedom of speech” protected by the First Amendment by being overbroad in scope. The Court stated that the CDA “lacked the precision the First Amendment requires when a statute regulates the content of speech...and the CDA’s burden on free speech is unacceptable if less restrictive alternatives would be at least as effective in

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22 U.S. CONST. amend. I.
23 The EFF raised several First Amendment cases to support its position, but for the sake of brevity, this Comment examines the Reno decision as the guiding precedent for First Amendment analysis of content regulated free speech.
25 The Communications Decency Act, 47 U.S.C. § 223, prohibited the “knowing transmission of obscene or indecent messages to any recipient under 18 years of age,” and “the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age.”
26 Reno, 521 U.S. at 844.
27 Id.
28 Id.
achieving the Act's legitimate purposes.\textsuperscript{29} The lack of Congress' statutory attention to detail and the open-ended prohibitions that applied to all nonprofit entities and individuals prompted the Court to invalidate the Act.\textsuperscript{30}

\textbf{B. Synthesizing Reno v. ACLU with the DMCA}

The \textit{Reno} decision mandates that Congress must be precise in its language when enacting content-based statutory regulations, and that the Government maintains a heavy burden in establishing the effectiveness of alternate measures to protect the interest.\textsuperscript{31} Though the RIAA managed to dodge a constitutional curveball when the District Court recently decided to dismiss the Felten claim, a successful challenge to the DMCA could raise serious implications for industry protections against digital piracy. While some courts have taken the general position that the DMCA does not violate free speech, the Felten team seeks to advance the right to publish information obtained through individual research, a practice common within the scientific community.\textsuperscript{32} Thus, the proper inquiry must be whether subsequent publication sufficiently advances scientific knowledge in itself, or, if such publication is impermissibly linked to copyright infringement so as to be considered integrated into the act of infringement. Unfortunately, there is no precise determination of standards that can accurately address this inquiry, as evidenced by the Felten litigation.

While the relevant provision appears to protect scientific research, it is unclear precisely how the Felten team's research and publication attempts are protected or prohibited by the DMCA. The team's research efforts may be properly within the scope of

\textsuperscript{29} \textit{Id.} at 871, 875. Though the Court recognized the Government's interest in protecting minors from harmful material, it held that the "purpose of protecting children from sexually explicit material does not foreclose inquiry into its validity," and rejected the argument that it should defer to congressional judgment that a total ban was most effective. \textit{Id.} at 875.

\textsuperscript{30} \textit{Id.}

\textsuperscript{31} \textit{See generally Reno,} 521 U.S. at 844.

\textsuperscript{32} \textit{See} Universal City Studios v. Reimerdes, 82 F.Supp 2d. 211 (S.D.N.Y. 2000).
the DMCA’s protective veil, but subsequent publication is questionable because the release of such information could be interpreted as paving the way for copyright infringement. This interpretive vagueness raises concerns for both sides, and could lead to litigation that diverts attention away from those that deserve prosecution.

IV. SOLUTION: BALANCING NECESSARY COPYRIGHT PROTECTION AGAINST SCIENTIFIC RESEARCH

The concern over the Felten papers is valid in light of the entertainment industry’s fight to protect the rights of its copyright holders and the scientific community’s desire to push towards technological advancements. The damage of digital protection is difficult to calculate, and the simple download of one song or CD severely affects the industry and consumers. Currently, millions of users freely swap copyrighted material by simple downloads, and detection and management of individual digital pirates is difficult.

Equally valid, however, is the right of individuals to freely express ideas and innovations. The Supreme Court, while consistently recognizing legitimate government interests in protecting against certain types of expressive mediums, will invalidate federal measures if other less intrusive measures could accomplish the same goal. Thus, in an adversarial process, a balancing of interests is warranted, and ultimately, the legitimate rights of one party may be diminished in favor of the other.

It appears that the purpose of the SDMI Challenge was to involve the scientific community in assisting the recording industry by scrutinizing its protective measures. However, the initial challenge to the Felten publication by the RIAA may have

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33 The proposed solution does not examine Congressional amendment of the language of the DMCA for two reasons: (1) The process of congressional amendment is often lengthy in comparison to the rapidness of digital piracy and the relative ease of stealing copyrighted works, thus it is not the most feasible solution at this time; and (2) the author has chosen to propose a solution that deals with the current DMCA because the Felten litigation, and subsequent challenges, may be resolved under the current statutory construction.
alienated the scientific community. While it is not likely that the dispute will be easily resolved, the implications of such litigation could hamper the industry’s efforts because the scientific community is one of its most valuable allies in the fight against digital piracy.

The most immediate solution would involve an alliance and discourse between the entertainment industry and the scientific community, encouraging the promotion of scientific research and exchange of ideas, while jointly working towards the eradication of digital piracy. Such efforts could involve a study of the First Amendment concerns, and how the RIAA, long an advocate of free speech, could be involved in efforts to protect its interests, while safeguarding the rights of others to freely publish their communications. Such analysis of current standards may reveal that the DMCA must be more specific in scope on what type of research leads to infringement. In the interim, an industry consensus must be reached explicitly adopting its position on scientific research and what it considers to be impermissible copyright infringement under the DMCA. An adversarial approach to the resolution of this problem may not be the most attractive solution for the parties concerned.

V. CONCLUSION

The DMCA’s purpose is important because it seeks to protect the rights of copyright holders against the damaging effects of digital piracy. However, the right to free speech has been raised, on the basis that the DMCA unconstitutionally restrains it, and this problem may not be quickly resolved for the RIAA. Regardless of personal positions on which right outweighs the other, a court declaration may curb such rights and lead to unfavorable results. What is essential is that the RIAA and the scientific community must reach a joint, mobilized front to effectively curb the digital piracy movement. Both communities, working together, could eventually shift the illegal exchange of copyrighted materials by

34 See Pruitt, supra at note 14.
collectively adopting measures that protect copyright holders and those that seek free speech.

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